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IN THE

Supreme Court of the United States

October Term, 1971

No. 72-392

RICHARD CRAMER and GWENDOLYN S. CRAMER,
Petitioners

v.

DIRECTOR OF REVENUE
(Formerly State Tax Commissioner)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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DIRECTOR OF REVENUE
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

The Petitioners, Richard Cramer and Gwendolyn S. Cramer pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Delaware rendered in these proceedings on June 12, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware, as yet unreported, appears at Appendix A, pp. 12-13 *infra*. The Superior Court of the State of Delaware, in and for Newcastle County, issued no written opinion.

The opinion of the State Tax Board of the State of Delaware is reported at 1 Del. Tax Cases ¶200-197, and appears at Appendix B, pp. 14-20 *infra*.

JURISDICTION

The final order or judgment of the Supreme Court of the State of Delaware was entered on June 12, 1972. See Appendix A, p. 12 *infra*. This Petition for Certiorari was filed less than ninety days from the date aforesaid. Jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether a state constitutionally may tax the income of non residents derived from personal services rendered in their state of residency on behalf of an employer located in the taxing state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the protection of the laws.

30 Del. Code, §1101, par. 7, states in pertinent part:

"The tax commissioner shall make rules, regulations and decisions not inconsistent with this title . . ."

STATEMENT OF THE CASE

Petitioner, Richard Cramer, is a research chemist employed by the DuPont Company in the State of Delaware on a salaried basis. His residence and domicile have, at all times pertinent hereto, been in the Commonwealth of Pennsylvania. Petitioner, Gwendolyn S. Cramer is joined as a party petitioner by virtue of her having filed joint income tax returns with Richard Cramer, the income which is the subject matter of this dispute having been earned solely by him.

For more than ten years, Richard Cramer has been crippled and moved about with difficulty with crutches. Because of his physical infirmity, he must of necessity, perform a substantial amount of work at his home in Pennsylvania, although he is not required to do so by his employer. As a result of working in this manner, Petitioner allocated a portion of his salary each year to work done in Pennsylvania and did not pay Delaware income tax on these sums so allocated.

The instant action arose out of a deficiency assessment in Petitioners' Delaware Income Tax return for 1962 in the amount of $507.92, and for 1963 in the amount of $601.75. These deficiencies were assessed when the Delaware State Tax Commission refused to credit Petitioner for the time worked outside the State of Delaware. Petitioners appealed to the State Tax Board which held, after hearing, that they should be given credit against the Delaware tax only for the services rendered on ordinary working days at the direction of or with the permission of the employer and could not be given credit for services performed in the evenings, on weekends and holidays, or work performed on days on which he was on paid sick leave status or vacation. The Board further ruled that Petitioner was not entitled to credit for any hours worked in excess of eight hours in any working day. See Exhibit B, *infra*, pp. 19-20. On appeal, the decision of the State Tax Board was affirmed by the Superior Court of the State of Delaware,

without opinion, and reaffirmed on appeal to the Supreme Court of Delaware, which adopted the opinion of the tax board. See Exhibit A, pp. 12-13 *infra*.

The decisions of the Delaware Courts and its Tax Board subject petitioners to the payment of income tax to the State of Delaware on income that arose out of services carried out in the Commonwealth of Pennsylvania. It is undisputed that petitioner must, of necessity by virtue of his physical condition, perform a substantial portion of his work at his residence, which is without the taxing jurisdiction.

Constitutional questions pressed in this Petition have been consistently raised by Petitioners throughout the proceedings. See Appendix B, *infra* p. 16. Neither the tax board nor the appellate court of the State of Delaware treated the constitutional questions in their decisions.

REASONS FOR GRANTING THE WRIT

The decisions below directly conflict with the well settled constitutional principle established by this Court that a state may tax only that portion of the income of a non resident which was earned within the taxing state or had its source within the taxing state.

The well-established-rule of *Shaffer v. Carter*, 252 U.S. 37 (1920) and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) is that a state may tax the income of non residents which accrues within that state. The converse of that principle, equally well established, is that a state is without jurisdiction to tax the income of non residents which is earned in another state. The rule laid down in *Shaffer, supra* is that:

> just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character and not more onerous in its effects, upon incomes accruing to non residents from their property or business within the said state or their occupation carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders.

Id., at 52 [*emphasis added*]. In *Travis, supra* it was held that a state may impose a tax upon the income of non-residents, "arising from a business, trade, profession or *occupation carried on within its borders* . . ." Id., at 75 [*emphasis added*].

It is with this basic principle that the decisions below can not be squared. In this case it has been proven that petitioner performed a substantial amount of labor in Pennsylvania, not from personal convenience or a desire to escape taxation by the State of Delaware, but out of necessity caused by physical disability. His was, "an occupation carried on within" the borders of Pennsylvania, not

of Delaware, which physically could not be performed in Delaware.

The fact that petitioners services were not required by his employer to be performed within Pennsylvania has no bearing upon the constitutional principles involved:

> This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any questions raised by the federal constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.

Schaffer v. Carter, 252 U.S. at 55 (citations omitted).

The practical effect of the decision below is to impose a tax upon the income attributable to services performed outside of the taxing jurisdiction by a non resident. This result is achieved by treating him in a manner substantially different from that which would be accorded an hourly employee. As a salaried employee, petitioner is paid for his total effort on behalf of his employer, whether or not the greater portion of his efforts are situated in Delaware or in Pennsylvania. Hypothetically, if petitioner was able to achieve his total work product solely by working at home on weekends, holidays and vacation periods and during sick leave, as well as "overtime" on some working days, the formula applied by the tax board and affirmed by the appellate court of Delaware would result in the taxation of a large portion of that income as if it had been derived from services rendered in Delaware. Such an interpretation flaunts the constitutional principles cited. The state would simply be taking advantage of the naked nexus established by the employer's location within its bounds.

The failure of the Delaware Courts to allocate a proper portion of Petitioner's income for services performed in Pennsylvania is constitutional error and deprives petitioner of the due process and equal protection of the law

afforded him by the fourteenth Amendment to the Constitution of the United States. This decision jeopardizes the constitutional rights of all non residents of Delaware who work for Delaware employers and sets a precedent which might be followed by other jurisdictions in enacting income tax laws, making it incumbent upon this court to enunciate guiding principals to those states which will attempt to tax the income of non residents.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Delaware.

Respectfully submitted,

LICHTENFELD & GALLAGHER

By: WILLIAM J. GALLAGHER
MICHAEL B. KEAN

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

RICHARD CRAMER and
GWENDOLYN S. CRAMER, *Appellants*

v. No. 73, 1971

DIRECTOR OF REVENUE
(formerly State Tax Commissioner), Appellee

(June 12, 1972)

Before WOLCOTT, Chief Justice, CAREY and HERRMANN, Associate Justices:

Upon appeal from Superior Court. Affirmed.

Edward Z. Sobocinski, Wilmington, and William J. Gallagher, Kennett Square, Pennsylvania, for appellants.

Edward J. Wilson, Deputy Attorney General for Division of Revenue, Wilmington, for appellee.

PER CURIAM:

This is an appeal from an affirmance by the Superior Court of the decision of the State Tax Board.

The case arises from an asserted deficiency in the appellants' Delaware Income Tax for 1962 in the amount of $507.92, and for 1963 in the amount of $601.75.

The Superior Court adopted the careful opinion of the State Tax Board. We, too, agree with the reasoning and conclusions stated therein.

Affirmed.

APPENDIX B

STATE TAX BOARD

STATE OF DELAWARE

RICHARD CRAMER and
GWENDOLYN S. CRAMER,
Petitioners

v. Docket No. 305

STATE TAX COMMISSIONER,
Respondent

OPINION AND DECISION

The petitions in these consolidated cases present appeals from the assessment of additional income taxes for the years 1962 and 1963 imposed by the Commissioner upon the non-resident Petitioners by reason of allocation of earnings of Petitioner, Richard Cramer (hereinafter "taxpayer"), from employment in Delaware. The Commissioner refused to credit taxpayer for days worked outside the State of Delaware, much of the time detailed by taxpayer as work at home in Pennsylvania on the business of his Delaware employer.

The petitions, and a Motion for Summary Judgment filed by Petitioners, also raise procedural questions; that is, whether or not the assessment notice was fatally defective, and whether the doctrine of collateral estoppel is applicable against the Commissioner because of a prior proceeding by him to effect collection of taxes assessed for 1960, but not appealed to this Board, based upon the same issues involved in this case.

Heard upon Petition, Answer, Motions and Affidavit, documentary evidence and oral testimony.

C. W. Mortenson, Esquire of Wilmington for Petitioners.

Ruth M. Ferrell, Esquire, Deputy Attorney General, for the State Tax Commissioner.

Before Leroy A. Brill, George L. Townsend* and W. Howard Workman, State Tax Board
BRILL, Chairman:

PROCEDURAL MATTERS

The notices of the deficiencies in this case were issued by the Commissioner and addressed only to taxpayer, Richard Cramer, although the income tax returns for both years were joint returns and were signed by both Petitioners, husband and wife. At the outset we are confronted by the Petitioners' Motion to Dismiss and their Motion for Summary Judgment. We consider the Motion to Dismiss as in reality a part of the Motion for Summary Judgment and as one of the grounds therefor, as we can see no purpose in dismissal of the petition by Petitioners if they contest these taxes, as they certainly do. The Motion for Summary Judgment is based upon two grounds:

(1) The notices of assessment were fatally defective because sent only to the taxpayer and not to both husband and wife; and

(2) The Commissioner is collaterally estopped from proceeding with the assessment of these taxes.

Although joint returns were filed as permitted under our law, the notices of deficiency were addressed and sent only to the taxpayer, the husband, Richard Cramer. The Petitioners reside together.

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*Mr. Townsend has since resigned as a member of the State Tax Board, and did not take part in this decision.

In *DuMais*, 40 T.C. 269, it was held that a separate notice of deficiency for United States income taxes sent to the wife only, where the return was a joint one, was invalid. However, that case was expressly overruled by the Tax Court of the United States in *Marie A. Dolan*, 44 T.C. 420 (1965). The latter case holds that separate notices may be sent to each of the husband and wife, or only to one; but the assessment entered on such a separate notice may be ineffective as to the other, not noticed. *U.S. v. Hammerstein*, 20 F. Supp. 744. Accordingly, we hold that the notices of assessment in these petitions are valid as against taxpayer, Richard Cramer. We have not been requested to grant separately a motion for summary judgment in favor only of Mrs. Cramer, and do not decide whether or not the notices would support valid assessments as against her.

The Commissioner filed suit and a garnishment proceeding in a Magistrate's Court in New Castle County for unpaid income taxes due on the joint 1960 return of these Petitioners. Trial was held upon the voluntary and cooperative appearance of Petitioners before the Magistrate, and resulted in a decision in favor of the Commissioner against taxpayers. However, an appeal *de novo* was taken by Petitioners to the Superior Court. Upon default of the Commissioner, a judgment of dismissal was entered in Superior Court against him and ordering him to pay court costs. As far as we can determine from our record in this proceeding, that resulted in vacating the Magistrate's decision, but specifically decided nothing upon the merits of Petitioners' claim that the taxes were invalidly assessed.

Petitioners show by affidavit supporting their Motion, that the reason they contested the suit to collect the 1960 taxes was the same one involved in this case; that is, that the Commissioner's allocation to Delaware employment of earnings under the formula which he applies in general use under a regulation of the Tax Department was void and unconstitutional in its application to the Petitioners.

For this reason, say the Petitioners, these assessments cannot be enforced by the Commissioner because he is collaterally estopped by reason of the former proceedings.

As we understand the record, the only trial and decision upon the merits of Petitioners' claim of invalidity occurred in the Magistrate's proceeding, but that resulted adversely to Petitioners. Presumably, the effect of the default in the Superior Court action was to set aside the Magistrate's judgment. As we see it, this left the parties in essentially the same posture in which they stood before the Magistrate proceeding, except that it may well be that another action at law by the Commissioner to effect collection of the *1960* assessment would be barred. But this does not affect the Commissioner's right to assess and collect upon the *1962* and *1963* deficiencies, if they are correct. Stated differently, an essential element of collateral estoppel is missing here; that is, a prior decision upon the *merits* (on the same issue) in favor of the party asserting estoppel (Petitioners). See *New Milford Block Co. v. Ericson*, 206 A.2d 487, 3 Conn. Cir. 1 (1964).

Administrative action, such as assessment of a tax upon taxpayer's failure to file a Tax Court petition, cannot be the basis for application of *res judicata*. - *Goldstein v. United States*, 227 F.2d 1. "Collateral estoppel" is but an aspect of the general rule of *res judicata*. - *Bata v. Bata*, 163 A.2d 711, 39 Del. Ch. 258.

Even if the Superior Court dismissal in favor of Petitioners could be considered a complete reversal of the Magistrate and hence a judgment on the merits for Petitioners that the 1960 assessment was void or invalid upon the grounds alleged, the Commissioner is not collaterally estopped from proceeding with the 1962 and 1963 assessments because new facts are involved. The 1960 assessment was made upon the basis of taxpayer's earnings, schedule of hours spent at home in Pennsylvania and allocation of days worked in and outside of

Delaware, all events which happened in that year. Here, his earnings and time allotments concern events occurring in 1962 and 1963, which were not the same as occurred in 1960.** Collateral estoppel cannot apply where new or different facts occur subsequent to the prior litigation. *Commissioner v. Sunnen*, 333 U.S. 591 (1948). In further support, we quote from a decision of the U.S. Tax Court in *Walter Wilson Flora*, 47 T.C. 410 (1956):

> "For the doctrine of collateral estoppel to apply in tax litigation involving different taxable years, the taxpayer must be the same . . . the matter raised in the second case must be identical with the matter decided in the first proceeding, the controlling facts must be the same, and there must have been no change in the applicable legal principles or atmosphere. Where such a situation exists, and a question of fact essential to the judgment in the prior proceeding was actually litigated and determined in the prior proceeding, the parties are bound by that determination in a subsequent proceeding even though the tax year of the taxpayer is different and hence the cause of action is different; also the prior judgment will be conclusive as to the same legal issues involved in the two cases, assuming there is no intervening doctrinal change. Commissioner v. Sunnen, supra."

Accordingly, the "Motion to Dismiss" and "Motion for Summary Judgment" are overruled.

THE ASSESSMENTS

Concerning the merits of this case, taxpayer's claims are substantially the same as those presented before this Board in the case of *McClellan v. State Tax Commissioner*, Docket No. 277, decided by us June 18,

** Transcript, pp. 19, 20.

1965.* In that case we held that as to a nonresident Dupont executive, in circumstances quite similar to those of the Petitioner, his time worked at home on a voluntary basis on weekends, evenings, and when he was confined to a hospital and on sick leave, could not be excluded as days worked in the service of his employer outside the State of Delaware. We adhere to that ruling.

Accordingly, in this case we hold that the Petitioner may not deduct the time worked at his home in Landenburg, Pennsylvania in the evenings or on weekends, nor upon any days on which he was on paid sick leave status. However, he is entitled to fully deduct those days, occurring on regular workdays, when he worked at his home rather than in the laboratory in Delaware, either upon the direction of his employer or with its permission. Due to a physical disability, the taxpayer often worked at home in this fashion, and of course we do not think he should be penalized in any way because of this arrangement.

One further word is needed, however, to clarify the recomputation of his taxes for these years. In keeping his detailed and accurate records of time worked and projects upon which he worked, taxpayer listed his time hourly, totaled up his hours, and obtained the number of working days by dividing total hours by eight. We do not think this is in accordance with the Commissioner's formula, which we have held to be a reasonable one. The taxpayer should actually list the working days upon which he worked, and we understand he is able to do this by reference to his diary and a calendar. For example, taxpayer may not take credit for three working days for each 24 hours of work. On those days upon which he worked at home more than eight hours, the excess is considered a voluntary contribution and falls within the *McClellan* ruling.

Taxpayer asserts an additional point involving the constitutionality of the Delaware law. He complains that he is allowed to deduct only $300 ($600 on the joint

*Appealed to Superior Court. We understand the case is still pending.

returns) as a deduction for Federal income taxes paid,* when in fact his Federal taxes were far in excess of that amount. Being an administrative, quasi-judicial body, this Board must apply the Delaware law as it is written and interpreted by the Courts. We cannot change it; nor may we question its constitutionality, according to the weight of the authorities. See the exhaustive opinion of the District of Columbia Tax Court, Opinion No. 1054, filed December 22, 1965, in the matter of *Paul S. Davids, Petitioner v. District of Columbia, Respondent,* Docket No. 1969.

At the hearing it was agreed that Petitioners' claim for an off-set against any taxes found to be due for these years 1962 and 1963, because of court costs owned to them by the State Tax Commissioner as a result of the 1960 proceedings, can not be considered.

Accordingly, the determination of the State Tax Commissioner is affirmed, except to the extent necessary to correctly calculate the number of days worked outside of Delaware in accordance with this opinion; that is to say, taxpayer should be given credit for all of the days worked at home which were not overtime, Sundays or holidays, and which did not occur during periods when taxpayer was on paid sick leave.

If the parties cannot agree promptly on computation of the exact taxes due, they shall proceed pursuant to Rule 31.

Unless we receive a proposed Order or the parties' computations under Rule 31, earlier, the date of this decision shall be June 1, 1968.

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*30 Del. Code 1118(3).

STATE TAX BOARD

By _____
Leroy A. Brill, Chairman

_____
W. Howard Workman

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-392.

RICHARD CRAMER and GWENDOLYN S. CRAMER,
Petitioners,

v.

DIRECTOR OF REVENUE,
(Formerly State Tax Commissioner)
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR RESPONDENT IN OPPOSITION.

At the specific request of the Court, by letter from the Clerk dated November 6, 1972, received November 15, 1972, Respondent files this Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

JURISDICTION.

Jurisdiction of this Court has not been properly invoked under 28 U. S. C. § 1257(3). The jurisdictional defects of the Petition are discussed in the argument portion of this Brief.

QUESTIONS PRESENTED.

1. Is the Petition for a Writ of Certiorari fatally defective because it fails to comply with Rule 23(1)(f) of the Rules of this Court?

2. Does this Court have jurisdiction to review the judgment below when the single purported federal question drawn into issue here apparently was not properly presented to or decided by the highest state court?

3. Does this Court have jurisdiction to review the judgment when the single question drawn into issue by the Petition is not a substantial federal question?

STATUTORY PROVISIONS INVOLVED.

30 *Del. Code*, § 1118, as amended by 49 *Del. Laws*, ch. 104, § 7, effective January 1, 1953, states in pertinent part:

> "§ 1118. Deductions
>
> "In computing net income, the following deductions shall be allowed—
>
> • • •
>
> "(3) Taxes imposed upon and accrued or paid by the taxable, including Delaware liquor and gasoline taxes, within the income year, except Delaware income taxes assessed for local benefits of a kind tending to increase the value of property assessed, and Federal Income Taxes in excess of $300."

STATEMENT OF THE CASE.

The Respondent takes no issue with Petitioner's[1] representations as to residence and domicile in Pennsylvania, to his employment in Delaware and as to the existence during 1962 and 1963 of Petitioner Richard Cramer's physical infirmity. There is, however, nothing in the record of this case which supports Petitioner's assertions that it was *necessary* for him to work at home.

Further, the State Tax Board, reviewing the ruling of the Respondent, determined as a matter of fact that only some of Mr. Cramer's time spent in Pennsylvania reading and thinking about his job was so spent with the permission or under the direction of his Delaware employer (Petition, p. 15). Applying its rule formulated in *McClellan v. State Tax Commissioner,* Docket No. 277, June 18, 1965, 1 Del. Tax Cases ¶ 200-113, Exhibit A, pp. 11-16, *infra,* the State Tax Board held that only for so much of his time spent at home under the direction or with the permission of his Delaware employer could Richard Cramer be considered compensated by his employer. The other time spent at home was held to be voluntarily so spent and, insofar as the employer may have benefited, a voluntary contribution to the employer. And, insofar as Mr. Cramer worked at home with the permission or under the direction of his Delaware employer, the time he spent in excess of eight hours for each twenty-four-hour day also was held to be a voluntary contribution to the employer, since the employer required of its salaried employees only eight hours of labor per ordinary working day. For the same reason, the Board found that Mr.

1. Although both Mr. and Mrs. Cramer were parties to the proceedings below respecting their joint tax return, the relevant facts here concern only Richard Cramer, to whom the term "Petitioner" refers throughout the balance of this brief.

Cramer's time spent on weekends and holidays was not required and, hence, not compensated. Taking, then, only the amount of time during the ordinary number of hours required by the employer on the employer's regular working days, the Board apportioned Petitioner's income between the time spent by Mr. Cramer at the Delaware laboratories and offices of his employer and the time spent by him at home under the direction or with the permission of his employer.

It is not apparent that Petitioner has heretofore raised, far less pressed, any constitutional challenge to this method of apportionment, either at the State Tax Board or in his appeals to the Superior Court and Supreme Court of Delaware.

REASONS WHY THE WRIT SHOULD BE DENIED.

I. The Petition Is Fatally Defective for Its Failure to Show Prima Facie, as Required by Rule 23(1)(f), Whether or in What Manner the Federal Question Asserted Here Was Presented to or Decided by Any State Court Below.

Rule 23(1)(f) of the Rules of this Court requires that a petition for a writ of certiorari seeking review of a state court judgment, such as here, shall specify "the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised." Neither in the "Statement of the Case" nor elsewhere in the Petition is this information given.

Rule 23(1)(f) further requires that the Petition detail the method by which the federal question was raised in and the way in which it was passed upon by the state court. The Petition does not provide this Court with any information in either regard.

The only effort made by the Petitioner to comply with Rule 23(1)(f) is the bald assertion at p. 5 of the Petition that:

> "Constitutional questions pressed in this Petition have been consistently raised by Petitioners throughout the proceedings. See Appendix B, *infra* p. 16. Neither the tax board nor the appellate court of the State of Delaware treated the constitutional questions in their decisions."

An examination of Appendix B, p. 16 of the Petition reveals a discussion of a constitutional challenge *only* to 30 *Del. C.* § 1118(3) respecting a deduction for Federal in-

come taxes paid on the Delaware income tax return. *That* constitutional issue is not so much as mentioned, far less discussed, anywhere else in the Petition.

Nowhere in the Petition has Petitioner revealed whether or in what manner the alleged federal issue of allocation of income was presented to or decided by either the Superior Court of the State of Delaware, in and for New Castle County, or the Supreme Court of the State of Delaware. Since this Petition does not comply with Rule 23(1)(f) in any respect, sufficient reason exists to deny the Petition under Rule 23(4).

II. This Court Lacks Jurisdiction Under 28 U. S. C. §§ 1257(2), 1257(3) to Review the State Court Judgment Since the Federal Question Here Asserted Never Was Properly Drawn Into Question or Decided Below.

The Petitioner seeks review of a state court judgment for an asserted federal question, viz., the conformity of Delaware's method of apportioning for tax purposes Petitioner's income between Delaware and Pennsylvania with the requirements of Due Process, United States Constitution, Fourteenth Amendment. If this were a genuine federal question, which Respondent contends it is not, Petitioner must demonstrate that this Court has jurisdiction to consider it. This Court has repeatedly held that a question presented for review either must have been specifically decided by the courts below or must have been presented to those courts in such a manner that it was necessarily decided in the course of reaching their judgments. *Street v. New York*, 394 U. S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U. S. 203, 206 (1945); 28 *U. S. C.* §§ 1257(2), 1257(3). There is nothing in the Petition to indicate that *this* federal question, as opposed to a challenge to the deduction for federal income taxes, was ever presented as a

constitutional issue below such that the state courts could pass upon it. And when it is not apparent that the highest state court has passed upon a federal question, this Court will assume "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, *e.g.*, Bailey v. Anderson, *supra;* Chicago I. & L. R. Co. v. McGuire, 196 U. S. 128, 131-133 (1905)." *Street v. New York, supra,* at 582.

In the absence of demonstrable jurisdiction to review the federal question asserted by this Petition, the Petition ought to be denied.

III. This Court Lacks Jurisdiction Under 28 U. S. C. §§ 1257(2), 1257(3) to Review the State Judgment Since the Validity of No State Statute Is Drawn Into Question Nor Is Any Title, Right, Privilege or Immunity Specially Set Up or Claimed Under the Constitution of the United States by This Peittion.

Petitioner has argued as the sole reason for granting the Writ that the Respondent has imposed a Delaware tax upon the income attributable to services performed outside of the taxing jurisdiction by a nonresident. If this representation of Respondent's taxing activity were true, a federal question might be at issue. But such activity simply has not taken place. It has been the policy of the Respondent to impose Delaware's income tax on income received by nonresidents from Delaware employers, apportioned between Delaware and the state of residence according to the degree in which the total employment activity took place in Delaware or elsewhere. The Respondent has ruled that an employee is paid by his employer for those activities undertaken by the employee under the direction or with the permission of the employer. See

McClellan v. State Tax Commissioner, No. 277, Exhibit A, *infra*. If an employee spends additional time or effort on his work, to the extent the employer is benefited, it is a voluntary contribution to the employer. Since this extra time or effort is not required by the employer as a condition for payment of salary, i.e., since the employee would receive his full salary whether or not he spends the additional time, it may not be considered in the allocation of a nonresident's income between Delaware and elsewhere. Just as *extra* time spent in his Delaware laboratory would not increase the allocation of a nonresident's income to Delaware, so *extra* time spent elsewhere would not decrease the allocation of nonresident income to Delaware. The Respondent has found that this employer ordinarily requires its salaried research employees to spend eight hours per day, excepting Saturdays, Sundays and holidays, at the employer's laboratories in Delaware. Petitioner has not contested this finding. Accordingly, Petitioner Richard Cramer's income is allocated to Delaware according to the percentage of total days worked in Delaware out of the total days worked under the direction or with the permission of the employer.

Petitioner, however, appears to contend that the requirements of his employer are irrelevant to the allocation of the income he receives, that *all* time spent, even on his own initiative at the place of his own choosing, ought, as a matter of Due Process, to be the basis of allocation. Such a contention does not raise a federal question. As this Court declared in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1941):

> "* * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given,

to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."

The Petitioner is not self-employed. He works for, receives a salary from, is supervised by and spends much of his required working hours at a chemical company in Delaware. He can be said to be employed or to carry on his occupation only so far as he performs his work as directed or authorized by his employer in Delaware. Cf. *Shaffer v. Carter*, 252 U. S. 37, 52 (1920). To the extent that Petitioner's work is also his hobby, that is not a basis on which his salary is paid or on which his Delaware income tax ought to be levied.

CONCLUSION.

For the foregoing reasons and authorities, a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Delaware should be denied.

Respectfully submitted,

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EXHIBIT A.

STATE TAX BOARD
STATE OF DELAWARE

DOCKET No. 277.

WILLIAM R. AND MARY G. McCLENNAN,
Petitioners,

v.

STATE TAX COMMISSIONER
Respondent.

Opinion and Decision.

This is an appeal from an assessment by the State Tax Commissioner of a deficiency in Delaware personal income tax for the year 1961, heard upon Petition and Answer, Exhibits, Oral Arguments and Briefs.

Carl W. Mortenson, Esquire, of Wilmington, Delaware for Petitioner. Ruth M. Ferrell, Deputy Attorney General, for Respondent.

Leroy A. Brill, George L. Townsend, and W. Howard Workman, State Tax Board:

The Petitioner* is a resident of the State of Pennsylvania but is employed in Delaware as a research chemist by the Du Pont Company. The question in this case concerns the allocation of part of his earnings from his em-

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* Petitioners filed a joint return, but reference herein is to Dr. McClennan as Petitioner or taxpayer.

ployment to work performed outside the State of Delaware, and therefore tax exempt.

In computing his Delaware income tax for 1961, taxpayer excluded as non-taxable the portion of his salary attributable to 153½ days of services performed outside the State. Except for two or three days during which he traveled to Chicago in connection with his employment, the Commissioner disputes taxpayer's computations. Taxpayer claims, and has proven, that during the time he was in a hospital in Pennsylvania he performed some of his duties by having his sister, also employed at Du Pont, bring material to the hospital on which he would work. He worked a considerable number of hours during his stay in the hospital, which he translated into days of allocation as services performed outside of Delaware. The remaining days claimed consisted of time spent working at his home in Pennsylvania on weekends.

Basically, taxpayer's position is that under his contract of employment he is an "inventive" employee and any ideas that he develops in connection with his job belong to Du Pont, regardless of when and where conceived; and because his employment contract calls for his entire time to be spent in the employment of Du Pont, all hours he spent in mental or physical activity on his employment should be counted as days worked.

The Tax Commissioner does not contest the apportionment to days not employed in Delaware of the days covering the trip to Chicago, but claims that all of the rest of the time allocated by Petitioner to employment outside of Delaware consisted of hours of voluntary services; and that the only effect of his employment contract is that he is not free to disclose any ideas, patents or formulas of which he has knowledge or developed in connection with his employment, and that he is not to accept other employment during the term of his employment with Du Pont.

Under the provisions of Section 1101, of 30 Del. Code, a non-resident of Delaware is defined, and his income is taxable, as follows:

> "(7) every natural person who is a non-resident of the State of Delaware, if but only to the extent that such person received income during the taxable year as compensation for personal services rendered in the State of Delaware as an employee, in the conduct of the business of an employer, . . ."

Pursuant to this provision, the Commissioner promulgated a regulation in the form of instructions on the non-resident tax return which was in effect during the taxable year involved, and which was introduced in evidence. The formula thus applied for some years in Delaware treats as taxable only the portion of the income resulting from application to total salary of a fraction consisting of the total number of days of service rendered for the employer in Delaware divided by the total number of days of service for the employer everywhere. In computing the fraction to be applied, non-working days, such as holidays, are excluded. In explanation of the formula appearing in the instructions, the Commissioner there states (emphasis ours):

> "Contrary to existing law and regulations, numerous methods have been presented by taxpayers and counter-acting formulas introduced by staff personnel in striving to determine 'taxable income' of non-residents of Delaware who are *required to perform official services* outside of Delaware for their employers."

This statement reflects the administrative practice of attributing to exempt, out-state earnings only those serv-

ices required of an employee in connection with his job. We think the Commissioner's interpretation and the formula worked out by him, with the assistance of an opinion of the Office of the Attorney General dated May 9, 1956, is a reasonable and practical one. We find accordingly that only services required in his employment to be performed outside of Delaware may be excluded by a non-resident in computing the portion of his income which is not subject to tax by Delaware.

Commendable as it was for an executive employee such as the Petitioner to work on weekends, during vacations, and even while he was in the hospital, yet it was voluntary on his part and was done, of course, with the hope of advancement and additional remuneration by way of bonus or fringe benefits.

There is very little law on this particular point. However, it has been held that where the law is based on services rendered within the State, no deduction is allowed for earnings during vacation periods outside the taxing state. *Hughes v. Tax Commissioner,* Minn. Dist. Ct., 2nd Jud. Dist. (Dec. 1937). In *Hughes v. Spaeth,* 207 Minn. 577 (at 578), 292 N. W. 194, the taaxpayer attempted to deduct a proportion of his salary for a paid vacation taken outside of Minnesota. In denying this claim, the Court held that employment is unitary, and that "people are paid for working, not taking vacations." The Minnesota statute provided that "income of non-resident taxpayers from such sources (compensation for labor or personal services) shall be assigned to this State if, and to the extent that the labor or services are performed within it." Thus the Minnesota law was quite comparable to our statute.

Concerning taxpayer's argument that he was paid for his entire time, the employment contract contained the following provision:

"that the employee shall devote his entire time and his best efforts . . . during the period of his employment by the employer . . . to such duties as may be assigned to him, ..."

Taxpayer would have us construe his contract to require that his entire time, whether on or off the job, was at the disposal of his employer. However, it takes no citation of law to find that the reasonable interpretation of such clauses in employment contracts is merely that the employee's entire, regular working hours shall be at the disposal of the employer, and he shall not accept other employment during regular business hours.

Another point originally made by Petitioner but deferred or abandoned on brief, was that the Delaware law as applied to taxpayers in the position of the Petitioner is unconstitutional. While we have serious doubt as to whether the Tax Board may pass upon the constitutionality of a Delaware statute or its application, we note in passing that the Supreme Court of the United States has held that a State may impose non-discriminatory income taxes upon incomes accruing to non-residents from their occupations carried on within the State. See *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1919), followed in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 S. Ct. 228.

With respect to the trip to Chicago, it is clear that compensation for those days is excludible as for duty assigned outside of the State. A third day was used by Petitioner in travel, and although there is some indication in the evidence that this resulted from travel arrangements for his personal convenience, we find that he is entitled to exclude all three days for this trip.

Accordingly, we must find in favor of the Commissioner and against the Petitioner. The assessment is up-

held, except to the extent that it does not include an allocation of earnings for three working days for services performed outside Delaware.

TAX BOARD OF THE STATE OF DELAWARE

LEROY A. BRILL
Leroy A. Brill

GEORGE L. TOWNSEND
George L. Townsend

W. HOWARD WORKMAN
W. Howard Workman

Date of Decision: June 18, 1965